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Case study in ADR

The first mediation course in Fiji

David Spencer¹

Introduction

Fiji is rife with disputes. Like most communities it has disputes that cover a wide variety of areas such as neighbourhood disputes, family disputes, commercial disputes and environmental disputes. But it is the area of industrial relations that generates the most disputes in Fiji. These disputes are quite serious in terms of their outcomes because, unlike Australia, Fiji has no social security safety net. If a Fijian loses his or her job they have no source of financial support to fall back on.

In 1973 the Fiji Government enacted the *Trade Disputes Act* Cap 97 (Fiji) (the Act) that requires parties to try and resolve disputes themselves. But if the parties fail to resolve the dispute themselves, the Act forces the parties to conciliation, sometimes followed by arbitration. This complex weave of dispute resolution processes is designed to maximise the chances of resolution before drastic action can occur, such as dismissal or a strike.

There is currently a backlog in the Fijian courts of up to three years to have most disputes heard. Even in Fiji's lowest court, the Magistrates Court, it takes about one year to have a matter heard. The costs are also prohibitive for litigants who cannot afford to have matters litigated. This has resulted in some corporations dismissing the law firms acting for them in favour of presenting their own cases in arbitration. Arbitration is also being criticised because of the amount of time it takes to have the award handed down. It is not uncommon to wait two years for an arbitration award in Fiji. Recently, three judges in the Fiji Court of Appeal and one judge of the Fiji High Court stated respectively:

This case provided an ideal opportunity for alternative dispute resolution, particularly mediation in preference to the costly and protracted Court process in which the parties have indulged. Had such a solution been attempted then both sides could have saved a considerable expenditure of time, money and emotion. Family disputes of this nature are ideal candidates for mediation techniques.²

This type of neighbour dispute is not suitable for adjudication in the High

Division of Law and the Graduate School of the Environment and is designed, amongst other things, to advise and implement dispute resolution systems for government and industry. The consultative and training team consisted of:

- Professor Zada Lipman, Professor of Law in the Division of Law at Macquarie University, former NSW Barrister and Director of CeDAR.
- Dr Alan Stewart, a former Member of the NSW Legislative Assembly and Assessor of the NSW Land and

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Court and I indicated earlier this year that it should be the subject of mediation as an alternative to transfer to the Magistrates' Court. Unfortunately settlement has been unsuccessful.³

The Fijian Parliament has before it a new Industrial Relations Bill (the Bill) which seeks to preserve the stages of dispute resolution currently being practised but introduces mediation as an additional method of dispute resolution prior to adjudication.

It was against this background that Macquarie University's Centre for Dispute Assessment and Resolution (CeDAR) was employed to deliver consultancy and training services to the Fiji Employers Federation and the University of South Pacific in January 2004. CeDAR is a joint initiative between the Macquarie University

Environment Court and Visiting Fellow at the Macquarie University Graduate School of the Environment.

- Bill McCabe, the former Australian Trade Commissioner in Fiji and Visiting Fellow at the Macquarie University Graduate School of the Environment.
- David Spencer, a current practising solicitor and Senior Lecturer in Law in the Division of Law at Macquarie University.

Together, the consultative and training team conducted the first mediation course for industry and the legal profession in Fiji. CeDAR concluded an agreement with the Australian Commercial Disputes Centre (ACDC) to accredit mediators according to the rigorous standards required by ACDC. All members of the teaching team were accredited



mediators with ACDC.

The four day mediation training course was conducted using the facilities of the Institute of Justice and Applied Legal Studies at the University of the South Pacific. The facilities were very good and included air conditioned rooms with data projectors, white boards, overhead projectors and air conditioned break out rooms each with their own white boards. The course was limited to 16 participants as this was the maximum number that could be accredited at one time. The 16 participants represented a good mix of interest groups from industry, government, trade union and the legal profession.

The Fijian Trade Disputes Act

Should a dispute arise between an employer and a trade union concerning employment or terms of employment which cannot be resolved by the parties themselves, the Act is invoked. Disputes are classed as being either disputes of 'Right' or 'Interest'. A 'Dispute of Interest' is a dispute created with the intent to produce a contract of employment between one or more unions and one or more employers reached through a process of collective bargaining or amendment to settle a new matter. A 'Dispute of Right' is a dispute concerning the interpretation, application or implementation of a collective agreement or any dispute that is not a dispute of interest, including any dispute that arises during the currency of a collective agreement.

An employer and trade union in dispute must first observe the internal mechanisms for resolving the dispute agreed to in their workplace agreement. If the parties cannot resolve the dispute then either party can report the dispute to the Permanent Secretary of the Ministry of Labour specifying, amongst other things, the matters in dispute and the steps taken to resolve those matters. Once having received a dispute report, the Permanent Secretary can accept or reject it and either advise the parties that the dispute is not a trade dispute under the Act or refer the dispute back to the parties if the Permanent Secretary believes the parties have not exhausted all means of settlement available to them.

Upon accepting the dispute, the Permanent Secretary will appoint a conciliator to either preside over conciliation, in the case of a Dispute of Interest, or chair a Disputes Committee, in the case of a Dispute of Right. Successful conciliation in either case results in a written agreement between the parties to the dispute. Participants in the course reported that conciliation at this stage of a Dispute of Interest results in a settlement rate of approximately 90 per cent. If no agreement is reached at conciliation, the matter is classed as having reached a deadlock and the trade union may call a strike providing it achieves more than a 50 per cent mandate of its voting members via a supervised secret ballot and has provided the Government with a 28 day notice to strike. In the case of industrial action by industries classed as 'essential services' (such as police, medical staff, the manufacture and supply of energy etc) they may not go on strike until compulsory arbitration has taken place. After a failed conciliation of a Dispute of Interest, the parties may agree to voluntary arbitration. For a Dispute of Interest there is no judicial review and the parties are bound by the decision of the Permanent Arbitrator.

Fiji employs a Permanent Arbitrator whose sole task is to arbitrate disputes. The most recent Permanent Arbitrator concluded his contract at the end of 2003, but has been re-employed on a short term contract to hear 11 cases still pending and to deliver awards on those matters.

In the case of a Dispute of Right the Permanent Secretary appoints a conciliator to chair the Disputes Committee who sits with an independent representative of each of the stakeholders to the dispute. If the dispute does not settle, the matter is referred to compulsory arbitration. Participants in the course reported that conciliation at this stage of a Dispute of Right result in a settlement rate of approximately 30 per cent. Sending disputes to the Disputes Committee only costs the parties FJD\$50 each. If there is no agreement reached at the Disputes Committee the Permanent Secretary refers the matter to the Minister for Labour, who in turn

recommends that the matter be referred to the Permanent Arbitrator. The Permanent Arbitrator's award can be appealed only on a point of law, which is heard by the Fiji Court of Appeal as the court of original jurisdiction.

The success and failure of the two different levels of conciliation needs further explanation. Participants in the course suggested that conciliation conducted for a Dispute of Interest is largely successful because parties are keen to avoid arbitration, which in Fiji is a very lengthy and expensive process. An arbitration involving a corporate supplier of energy involved in a commercial dispute reportedly concluding its hearing in April 2003 and was still waiting for the award to be handed down in January 2004. In that case the corporation had spent FJD\$1 million in legal and administrative costs to recover FJD\$400,000.

The Disputes Committee is perceived to have failed because of the composition of the committee. Having one independent representative of each stakeholder means you eventually end up with a deadlock. In other words, it has become virtually impossible to achieve a consensus with such representation on the committee. As with a Dispute of Interest, parties were motivated to avoid arbitration because of the high cost and time delay, but there was little hope of avoiding arbitration because of the composition of the Disputes Committee.

The new Industrial Relations Bill

The new Industrial Relations Bill 2004 (Fiji) (the Bill) seeks to amalgamate a number of pieces of legislation relating to industrial relations including the *Trade Disputes Act* Cap 97. The objects of the Bill are stated as being:

To provide for:

- (1) establishment of minimum terms and conditions of employment;
- (2) registration of trade unions and industrial associations;
- (3) recognition of trade unions;
- (4) harmonious settlement of trade

- disputes and personal grievances;
- (5) cooperative employer – worker relations; and
- (6) implementation of the Constitution of the labour market.⁴

The Bill states that it applies to all employers and workers in workplaces in the Fiji Islands, the Government and all persons in the service of the Government or any local authority, statutory authority or public authority except persons in the Fiji naval, military or air services and the police

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or prisons service. One of the most important aspects of the Bill is that it sets up a Labour Tribunal and a Labour Court which is modelled on the New Zealand Labour Court.

Part XXIX of the Bill sets up the Labour Tribunal (the Tribunal) which aims to:

... assist employers and their representatives and workers and their respective unions to achieve and maintain effective employment relations; in particular by facilitating mutual resolution of differences between parties to employment contracts.⁵

In performing the above stated role, the Tribunal can offer mediation in any matter before the Tribunal to any of the parties it believes is in need of assistance in order to resolve the dispute between them. The Tribunal's power to help parties resolve disputes is clearly defined as a two stage process. First, the Tribunal may mediate disputes between parties in order to facilitate agreed settlements and, second, the Tribunal can adjudicate a settlement between the parties to employment contracts.⁶

Section 253 of the Bill sets out the trigger mechanisms for mediation and

sub-section 253(1) states that either party may make application to the Tribunal for mediation providing the dispute is within the jurisdiction of the Tribunal. Sub-section (2) empowers a designated officer of the Tribunal to determine whether mediation should take place prior to adjudication where one or more parties have applied to have the dispute adjudicated. The Tribunal is empowered to reverse a decision taken by the designated officer under sub-section (2) and allow the

Tribunal to determine, 'that mediation assistance should first be provided'.⁷ Most importantly sub-section (6) states that mediation does not have to take place prior to adjudication.

It seems that s 253 of the Bill places participation in mediation at the discretion of the designated officer of the Tribunal prior to an adjudicative hearing taking place. This means that mediation is not a mandatory hurdle to jump over prior to adjudication. The view of most of the participants in the course was that such discretion would be exercised in favour of mediation more times than not in order to avoid creating a backlog of cases in the Tribunal.

Conclusion

The first mediation course in Fiji was by all accounts a great success. The *Fiji Times* reported:

When it comes to dispute resolution and avoidance, the winds of change are breezing through boardrooms around the country, if this week's mediation training course is anything to go by ... The team will this week help produce the first batch of trained mediators for Fiji, to help prevent [and] resolve



workplace disputes before they get out of hand and to provide solutions that both parties are happy with.⁸

Throughout the course there was an acceptance that mediation would not only assist in reducing the number of workplace disputes that are generated in Fiji, but that consensual problem solving produces better results than an imposed decision. Further, it was apparent that the participants saw the inadequacies of the current system of conciliation, arbitration and litigation and that perhaps another type of strategy could be useful in reducing the time and costs spent on the resolution of disputes. ●

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Endnotes

1. My thanks to Mr John O'Connor,

Health, Safety & Environment/ Industrial Relations Coordinator for Fiji Electricity Authority and Mr Walter Fraser, Registrar, University of the South Pacific for their assistance in the preparation of this paper.

2. *Raj v Sumintra* [1998] FJCA 5; Abu0043u.96s (12th February, 1998) per Sir Moti Tikaram P, Sir Ian Barker, Justice Gordon Ward JJA.

3. *Sobhna v Prasad* [2001] FJHC 20; HBC0018.01 (25th April, 2001) per Scott J.

4. Exposure Draft: Industrial Relations Bill 2004 (Fiji).

5. Exposure Draft: Section 251(1) Industrial Relations Bill 2004 (Fiji).

6. Exposure Draft: Section 251(3)(a) and (b) Industrial Relations Bill 2004 (Fiji).

7. Exposure Draft: Section 253(3) Industrial Relations Bill 2004 (Fiji).

8. Foster S, 'Mediation Pushed for Dispute Resolution', *Fiji Times*, 27 January 2004, p 16.